Panaro and Grimes, a Partnership d/b/a Azusa Ranch Market and United Food and Commercial Workers Union, Local 1167, AFL-CIO, CLC, and Local 1428, AFL-CIO, CLC, Petitioner. Case 31-RC-7350

July 19, 1996

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on January 26, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 22 for and 14 against the Petitioner, with 12 challenged ballots.¹

The Board has reviewed the record in light of the exceptions² and briefs, and has adopted the hearing officer's findings² and recommendations only to the extent consistent with this Decision and Direction.

We agree with the hearing officer, for the reasons stated in his report, that the challenge to the ballot of Maureen Contreras should be sustained. However, we find, contrary to the hearing officer's recommendations, that the challenges to the ballots of Steve Virgen, Anibal Felix, and Eugene Graham should be overruled.

The hearing officer found that Virgen, Felix, and Graham were supervisors within the meaning of Section 2(11) of the Act. We disagree.

The Employer operates a grocery store. Felix and Virgen held the position of "key carrier" and Graham's title was "liquor manager." Virgen testified that he spends approximately 30 percent of his time

running a cash register and the rest of his time is spent in the center booth where the computer is located. He is responsible for making sure that the milk cooler is filled, that breaks are given out, and money pickups are made from the cash registers. He assigns employees to fill the milk cooler, block the shelves, sweep, and clean, and he makes decisions about when to take cashiers and box persons off the register lines to work in other parts of the store and when to return them to the registers. Virgen is in charge of the store for several hours in the evening after Paul Dudich, the general manager, leaves the store and he is responsible for locking up the store at night.6 In Dudich's absence he has the authority to grant requests of employees to leave early, and can on his own decide to send an employee home for the day. Although Virgen decides when to give employees their breaks, Dudich instructed him that employees are supposed to get a break every 2 hours. Employees may request breaks, but the key carrier decides whether the store is too busy to enable an employee to take his break at the scheduled time. Virgen may request an employee to stay late, but he has no authority to require anyone to do so. He also has the authority to approve customers' personal checks and is responsible for approving all overrings.7 On several occasions Dudich has solicited Virgen's opinion about the performance of front-end employees. Virgen has also reported customer complaints about other employees to Dudich.

Felix instructed employees to fill beer coolers, rebuild side aisle displays, and replace merchandise that had not been purchased. He also allowed employees to go home early without consulting anyone else. Felix was sometimes in charge of the store in the morning before Dudich arrived. As did Virgen, Felix often changed employees' assignments from checker to other duties such as stocking shelves. Felix gave an employee a written disciplinary warning without consultation with anyone else, but there was no evidence as to what happened to the warning or whether the warning had any effect on the employment status of the employee who received it.

Graham's duties also include telling employees whether to open a register, or perform other tasks such as sweeping or stocking shelves. He gives breaks to the front-end employees and carries the keys to the store. An employee testified that he was told by one of the Employer's managers that he had to listen to Graham when he was running the front. Graham, like Felix and Virgen, has the authority to send employees home early, and about 2 weeks before the hearing Graham sent a sick employee home without consulting anyone else. About a week before the hearing, Graham

¹On March 29, 1996, the Regional Director issued a report recommending that the Employer's objections be overruled, the challenges to 2 ballots be sustained, and a hearing be held on the challenges to 10 ballots. No exceptions were filed to that report.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the challenges to the ballots of Werken Innabi, Hope Palmerton, Donna Valdez, Robert Hitchcock, Susanne Lucero, and Kari Janssen be overruled.

³The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

⁴ Although Felix did not testify in this proceeding, Virgen testified without contradiction that he and Virgen performed the same duties. Felix is no longer employed by the Employer.

⁵ At the time of the hearing the Employer no longer had a liquor department although it continued to sell beer and wine. The hearing officer found that Graham's duties were "akin to or identical to" those of Virgen and Felix. In light of the lack of contradictory evidence, we adopt the hearing officer's finding that all three of these individuals had similar authority.

⁶He carries the keys to the store and knows the code for the alarm system.

⁷ He carries the overring key.

jokingly told another employee that he had better be careful or Graham would write up the employee.

The hearing officer found Virgen to be a supervisor because he was in charge of the front end of the store on four evenings a week, he carried the store keys, he assigned other duties to cashiers and box persons, and was perceived as a supervisor. The hearing officer found Felix to be a supervisor based on his finding with respect to Virgen, Felix's ability to independently assign duties and discipline employees, and the Employer's failure to present Felix and rebut the testimony presented by the Petitioner. The hearing officer also found that in light of the Employer's failure to present contradictory evidence, Graham was employed in the same capacity as Virgen and Felix and was accordingly a supervisor within the meaning of Section 2(11) of the Act.

As noted above, we disagree with the hearing officer's conclusion that these employees are supervisors. Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, an individual who exercises some "supervisory authority" only in a routine, clerical, or perfunctory manner will not be found to be a supervisor. Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986). "The Board must judge whether the record proves that an alleged supervisor's role was other than routine communication of instructions between management and employees without the exercise of any significant discretion." Further, the burden of proving that an individual is a supervisor is on the party alleging such status. California Beverage Co., 283 NLRB 328 (1987). The Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. Hydro Conduit Corp., 254 NLRB 433, 437 (1981).

Applying these principles to the facts of this case, we find that the Petitioner has not met its burden of proving that these three individuals possess supervisory authority within the meaning of Section 2(11).

There is no evidence that these individuals have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward employees or adjust their grievances, or to effectively recommend such action.

We find that the limited authority of these individuals to assign routine duties to employees and direct employees to change their duties is insufficient to warrant a finding of supervisory status. In our view, the Petitioner has not met its burden of showing that this authority to assign is anything other than routine, not requiring the exercise of independent judgment within the meaning of Section 2(11). The Board has found employees with similar assignment authority not to be supervisors in light of the routine nature of decisions made pursuant to such authority.¹⁰

The record shows that these individuals have the authority to tell employees when to go on break, but they have been instructed by Dudich that breaks are generally to be taken at 2 hour intervals. The fact that occasionally an employee's break may be delayed if the store is especially busy is insufficient to warrant a finding of supervisory status where, as here, there is no evidence that this decision is anything other than a routine clerical judgment.¹¹ The authority of these individuals to allow employees to leave early on request, or to request, but not require, employees to stay late, is routine and insufficient to confer supervisory status on these employees.¹²

Although the record shows that these individuals are responsible for the running of the front end of the store in Dudich's absence, this type of responsibility has not been found to compel a finding of supervisory status. ¹³ Nor does the fact that an employee carries the store keys require a finding that the employee is a supervisor. ¹⁴

Although there is evidence that Felix issued a disciplinary warning to an employee (and Graham jokingly threatened to issue one), there is no evidence that such warnings have any effect on an employee's employment status and there is no evidence as to what happened to the warning after it was given to the em-

⁸ In so finding, the hearing officer relied on *Clinton Food 4 Less*, 288 NLRB 597, 604–605 (1988).

⁹ Quadrex Environmental Co., 308 NLRB 101, 102 (1992).

¹⁰ Mack's Supermarkets, 288 NLRB 1082, 1089 (1988); and Smitty's Foods, 201 NLRB 283 (1973). We find Clinton Food 4 Less, supra, relied on by the hearing officer, to be distinguishable. In that case, the employee was salaried and earned more than other store employees. Moreover, the judge in that case also relied on the fact that the employee at issue coordinated with management in preparing a disaffection petition and solicited employee signatures on the petition on behalf of management.

¹¹ Parkview Manor, 321 NLRB 477 (1996); and Providence Hospital, 320 NLRB 717 (1996).

¹² C & W Super Markets v. NLRB, 581 F.2d 618 (7th Cir. 1978); Providence Hospital, supra; and Sears, Roebuck & Co., 304 NLRB 193, 197 (1991).

¹³ See Olney IGA Foodliner, 286 NLRB 741 (1987), enfd. sub nom. NLRB v. Don's Olney Foods, 870 F.2d 1279 (7th Cir. 1989); Foote's Dixie Dandy, Inc., 223 NLRB 1363 (1976); and Parkwood IGA Foodliner, 210 NLRB 349 (1974).

¹⁴ See, e.g., Quik-Pik Food Stores, 252 NLRB 506, 509 (1980).

ployee. Absent such evidence, the mere issuance of a written warning is insufficient to establish supervisory authority. Nor does the evidence that Virgen has reported customer complaints about employees to Dudich require a supervisory finding. The Board has held that such a reportorial function does not constitute supervisory authority. 16

The evidence that Dudich occasionally asked Virgen his opinion about the performance of front-end employees does not warrant a finding of supervisory status. Authority simply to evaluate employees without more is insufficient to confer supervisory status.¹⁷ In the instant case, the Petitioner has not met its burden

of showing that Virgen's comments had any effect on the employees' employment status.

For these reasons, we find that the Petitioner has not met its burden of proving that Virgen, Felix, and Graham are supervisors within the meaning of Section 2(11) of the Act. Accordingly, we shall overrule the challenges to their ballots.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 31 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Werken Innabi, Hope Palmerton, Donna Valdez, Robert Hitchcock, Susanne Lucero, Kari Janssen, Steve Virgen, Anibal Felix, and Eugene Graham, and prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

¹⁵ Passavant Health Center, 284 NLRB 887, 889 (1987).

¹⁶ Passavant Health Center, supra.

¹⁷ Providence Hospital, supra, slip op. at 17; and Quadrex Environmental, supra, 308 NLRB at 101.